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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 74

GRINNELL CORPORATION,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF RHODE ISLAND.

REPLY BRIEF FOR GRINNELL CORPORATION.

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1. *The Three-Pronged Decree.*

Government counsel have now conceded that Judge Wyzanski erred in two parts of his "three-pronged decree" (Gov't Br. pp. 38, 94). Their brief states of the injunction against continued employment of the witness Fleming: "We do not believe that this [record] is a sufficient basis to justify relief of such severity" (p. 95), and of the injunction to obey the Sherman Act: "In *Schine Chain Theatres v. United States,* 334 U. S. 110, 125-126, this Court condemned a similarly sweeping provision" (*ibid.*).

While defending the remaining prong (ordering divestiture by Grinnell of all its alarm company subsidiaries),* the government now concedes that distribution of alarm company stock to Grinnell's stockholders, as authorized below, would be an appropriate method of accomplishing any divestiture (Gov't Br. p. 87 fn.). But even at this late date, there is no adequate explanation as to why triple

* In doing so, the government denies that Grinnell acquired ADT after a Department of Justice "clearance". Plaintiff's answers to interrogatories indicate that the letter its brief suggests was a mere "thank you" letter (Gov't Br. p. 70 fn.) was sent when

divestiture would be necessary if there were a divorcement of ADT (which the government claims is itself a monopoly, Gov't Br. p. 89, although the trial court did not so find) from AFA and Holmes (which the government claims were precluded from competition with ADT, Gov't Br. p. 36). The government's silence takes on added significance in the light of its failure to controvert our arguments that Grinnell is not a substantial supplier or customer of any of the other defendants, and that its continued ownership of the stock of any alarm company would not afford that company any competitive advantage, and that Grinnell was merely an investor in the alarm companies (Grinnell Br. pp. 8-10, 64-66, 82-83).*

2. *The Fairness of the Trial.*

To the extent that the government's brief answers our arguments, it at least brings into sharper focus the points

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the Department decided to suspend inquiry concerning the proposed acquisition (Gr. Ex. J-76, R. 4309, 4311, 668). Grinnell's counsel at the time interpreted this as a "clearance" and so advised Grinnell (R. 681). While its good faith reliance on the Department's decision to go no further with its investigation may not constitute a defense, the government's position at the time of this acquisition is at least worthy of consideration in determining the scope of equitable relief (see Grinnell Br. p. 82). *Cf. United States v. United Shoe Machinery Corp.*, 110 F. Supp. 295, 333 (D. Mass. 1953), *aff'd per curiam*, 347 U. S. 521 (1954).

The government does acknowledge that it gave a "clearance" to ADT's later acquisition in Boston (Gov't Br. p. 71 fn.), which was the only acquisition consummated by ADT or any defendant in the allegedly-relevant market subsequent to Grinnell's investments in the alarm companies (Findings 49, 50, R. 757-58).

* The government concedes that Judge Wyzanski was in error in his finding distorting Mr. Fleming's testimony that he could only recall one instance in which an alarm company's management was overruled by its board of directors (Gov't Br. p. 82 fn.). Moreover, the government makes no effort to defend the trial court's ultimate conclusion that Grinnell participated in the operations of these companies. On the contrary, it apparently argues that Grinnell is responsible for what the alarm companies did, not because it actually participated in any of their actions, but because it had "the power to impose its will upon them" (Gov't Br. p. 81). Any such theory of vicarious liability runs afoul of the authorities we have already cited (Grinnell Br. p. 90).

at issue between the parties. Chief among these is the issue of whether or not the defendants had a fair trial, in the light of the trial judge's pretrial pronouncements on the merits, his conduct during the trial, and his punitive decree.*

Government counsel seek to explain some of Judge Wyzanski's statements during the trial on the ground that they "reflected merely misapprehensions about minor aspects of the case" (Gov't Br. p. 113); for example, when he admonished defense counsel:

> "The Court: * * * I have a strong objection to the misrepresentation. This Court set the matter for November, 1963 and has from time to time postponed it to meet the convenience of counsel" (R. 324).
>
> "The Court: * * * over my strong reluctance you insisted that I should hold a case in suspense so that you could confer about a possible settlement and that I could look at the papers with respect to the matter. You, not I, created the difficulty. Any Judge would properly resent being drawn into a situation as a trap and then have the door let loose" (R. 336).
>
> "The Court: You proceeded to disqualify two Judges and sought to disqualify the third on the eve of a trial that had been postponed for nine months" (*ibid.*).

Conceding that these statements were erroneous, the government maintains that they do not prove prejudice. We say that they are part of a mosaic which, viewed as a whole, compels the conclusion that in this case an able judge below was in fact prejudiced, and that the proceedings before him (regardless of who was at fault) lacked that judicial impartiality and detachment which are to be expected in our courts. *Offutt* v. *United States*, 348 U. S. 11, 14 (1954).

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* See *United States* v. *United Shoe Machinery Corp.*, *supra*, at pp. 347-48.

That mosaic stands in even bolder relief now that the government has agreed with us that such statements, impugning defendants' motives in making their disqualification motions, are incorrect. To begin with, the court was wrong when it stated it had set this case for trial prior to the peremptory 18-day notice given on May 28, 1964, and had postponed the trial at the request of defendants.* Again,

> "There is nothing in the record which supports the third statement that the pretrial submission of briefs as to relief was done over the judge's 'strong reluctance.' On the contrary, at the hearing on December 28, 1963 he had stated that he viewed the proposal as 'very helpful in this situation' (R. 128). *The court also erred in assuming that the defendants were responsible for the disqualification of the two other judges who previously had been assigned to hear the case.*" (Gov't Br. p. 113, emphasis added.)

Characterizing these as "minor factual errors" (Gov't Br. p. 113 fn.), government counsel attempt to explain or minimize them in various ways which require no detailed refutation here.

The record itself, which we quoted extensively in our main brief, amply answers these contentions. But the government's brief goes even further and seeks to justify Judge Wyzanski's pretrial statements to the effect that his views were even more extreme than those of the government. It suggests (a) that his opinion (which he formed not only prior to trial but prior to the receipt of any evidence) was "formed from the evidence in the case" (Gov't Br. p. 105), and (b) that his clear and colorful announcements before

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* "[T]here had been no indication prior to May 28 that the court was planning to set a trial date at that time" (Gov't Br. p. 107); in giving this "rather short" notice (*ibid.*) the court "may have acted somewhat strictly" (p. 108). Government counsel conclude, however, that the peremptory trial date, "while perhaps unexpected, was not unreasonable" (p. 114).

and during the trial* should be read as if they contained the unspoken premise that he was only expressing *tentative* views as to where he would come out "if the facts were as the government had alleged" (Gov't Br. pp. 39-40, 105).

It is true that Judge Wyzanski was relatively temperate in his comments at the abortive pretrial conference on relief of May 28, 1964, on which the government relies (see Grinnell Br. pp. 21-22). Defendants did not then claim he was disqualified; it was only after the conference of June 3, 1964, when the trial judge made the defendants realize that his convictions were unalterable, that they felt obliged to file affidavits of bias and prejudice.** From that time until after both sides had rested, Judge Wyzanski repeatedly told defendants (without any of the qualifying hypothetical premises government counsel now seek to read into the record): "You yourselves put on me the burden of forming an opinion and I did form one" (R. 336, see also R. 346) and that "I know very well where I come out" (R. 376). It was only "[a]fter the presentation of the evidence had been completed" (Gov't Br. p. 108)—and, of course, well after the defendants' disqualification petitions were filed—that Judge Wyzanski professed having an open mind. *Cf. Berger* v. *United States*, 255 U. S. 22, 36 (1921). These belated declarations are in marked contrast with his spontaneous statements before and during the trial.

Government counsel seem to be saying that even if Judge Wyzanski was prejudiced he was not disqualified

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E.g.: "I know where I come out not because I have, as has been suggested, a bias except that kind of bias which emanates from prior experience in this field, the kind of bias which constitutes judgment" (R. 376).

** He stated on June 3rd:

"* * * my views are more extreme than those of the government; and I have also made you realize that if I am required to make Findings and reach Conclusions I am opening up third-party suits that will make, in view of the size of the industry, the percentage of people involved higher than in the electrical cases. Is that clear?" (R. 281-82)

from conducting the trial because his prejudice was not personal (Gov't Br. p. 105).* The short answer to this is that it is difficult to conceive any bias or prejudice more disqualifying than an absolute prejudgment of the issues of both liability and relief—to the extent that the judge's views are admittedly more extreme than those of the plaintiff. A judge commencing a trial in that frame of mind is clearly personally prejudiced and incapable of according a fair trial (or, *a fortiori*, satisfying the appearance of justice). Defendants' request for the assignment of another judge not suffering from such personal bias and prejudice should therefore have been granted.

The government insists that Judge Wyzanski's preconceptions of this case were proper because they were based on its brief on relief (Gov't Br. p. 105). While that brief is not evidence in any event, nothing in it remotely resembles the lower court's unsupported findings concerning Mr. Fleming's or Grinnell's alleged domination of the alarm companies' operations (Grinnell Br. pp. 66-71). It is quite possible, however, that the government's "relief brief" was the source of the trial court's fundamental fallacies that Grinnell manufactures central station equipment (Findings 17, 20; R. 750, 751) and was precluded by the 1907 agreements from entering the central station busi-

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* The extent to which Judge Wyzanski was personally involved in this case is shown by the record. In an apparent reference to the newspaper publicity that attended the disqualification motions, Judge Wyzanski upbraided counsel:

> "The Court: You have made it quite plain to the country at large, or at least to this community, that you regarded me as having formed an opinion from some other way than a Judge ought to form an opinion." (R. 336)

Later that same day, he again remonstrated:

> "The Court: Mr. Fritz, all that you have done is to say that a Judge who has evidence that came into the Court necessarily was required to form an opinion, did form it to the extent necessary to make rulings, and on that basis you chose to file an affidavit of disqualification, the character of which may be the character of you but not of me." (R. 346)

ness (Finding 53, R. 760) for each of these misstatements is made in that brief (Plaintiff's Position as to the Basis of Liability of Each of the Defendants, pp. 37, 15, Box 8 of record on appeal as transmitted).* It is on this kind of "evidence" that the government rests its contention that it was proper for the trial court to prejudge this case.

Moreover, defendants were obviously entitled to a fair trial even if their affidavits of bias and prejudice were (as the government contends) technically insufficient. Our main brief demonstrates in detail that Judge Wyzanski conducted the trial in a manner so unfair as to require reversal independently of the disqualification statute. Among other things, it shows that prejudicial error resulted from the trial court's admission of all proffered evidence indiscriminately against all defendants, refusing to consider any objections, and from its failure to examine the evidence against each defendant separately and to distinguish among the defendants in its findings. In a last-ditch effort to correct these egregious errors, the government assures us that: "In preparing its brief the government has taken great care to rely only upon evidence that is clearly admissible" (Gov't Br. p. 117).

Perhaps anticipating that even this generous assurance may not assuage all doubt as to the absolute objectivity of the government's analysis of this voluminous record, its brief continues: "This Court, upon reviewing the record, will of course reject any evidence that it concludes was improperly admitted" (*ibid.*).**

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* Indeed, the government's present brief frequently makes the misstatement that the expired fire alarm agreements prohibited Grinnell from engaging in the central station business (Gov't Br. pp. 15, 35-36, 68) without citing any record references.

** A footnote to this statement reveals the government's doubts as to whether the district court was correct in its basic evidentiary ruling whereby it accepted all of the government's evidence *en masse* "on the conspiracy theory".

In other words, the government's solution to this welter of confusion is to ask this Court itself to review this monumental record, to make evidentiary rulings for the first time on defendants' numerous objections to this mass of material, and in effect to retry this case without the benefit of any live testimony. This narrows the difference between the parties on the fair trial issue to the question of whether the trial *de novo* should be conducted in this Court or by another district judge.*

3. *The Section 1 Charge.*

Consistent with the district court's failure to make any finding that Grinnell violated Section 1 of the Sherman Act (Grinnell Br. p. 87), the government's brief does not mention Grinnell in connection with Section 1, and thus appears to recognize that it can make out a case against Grinnell, if at all, only under Section 2 of the Sherman Act. Under these circumstances, the Section 1 charge should be dismissed.

4. *The Section 2 Charge.*

The government contends that it is not necessary for this Court to consider the post-trial presumption (Gov't Br. p. 82) on which the trial court relied as the main prop for its conclusions under Section 2 (see Grinnell Br. pp. 105-08). Moreover, the government also disagrees with Judge Wyzanski on the critical question of whether the *Cellophane* case, *United States* v. *E. I. duPont deNemours & Co.*, 351 U. S. 377 (1956), has been overruled. Although we are now advised that the district court "properly applied the *Cellophane* test" (Gov't Br. p. 33), Judge Wyzanski repeatedly rejected *Cellophane* as authority (Grinnell Br. p. 100), stating in part that the notion of cross-elasticity of demand is "out of the effective vocabulary of antitrust defendants" (R. 544).

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* As to the need for a new trial judge upon remand see, in addition to the cases cited in our main brief, *In re United States*, 286 F. 2d 556, 565 (1st Cir. 1961), *reversed on other grounds sub nom. Fong Foo* v. *United States*, 369 U. S. 141 (1962).

In final analysis the government acknowledges that the adjudication of a Section 2 violation can only be sustained by now imposing on this Court the burden of assuming the functions of a trial court (a) to determine the admissibility as to each defendant of an undigested mass of "evidence" contained in this voluminous record, (b) to weigh the sufficiency of the admissible evidence in light of proper standards (as to the burden of proof and the ascertainment of the relevant market) radically different from those employed by the trial court herein, and (c) then, in light of such evidence and such proper standards, to make new findings which the district court either failed or refused to make. If by that tortuous process this Court should come to agree with the district court on the issue of liability, the government would then have this case remanded to the district court "for further proceedings with respect to relief" (Gov't Br. "Conclusion").

Conclusion.

In view of the government's concessions on relief and on the trial court's treatment of the evidence, it is clear that a complete review of this record is required unless this case is dismissed in whole or in part (*i.e.*, as to either both charges or the Section 1 charge alone) for the reasons stated in our main brief. Accordingly, if and to the extent that the government's charges are not dismissed, they must be remanded for a new trial before a new trial judge.

Dated: New York, N. Y.
March 24, 1966.

Respectfully submitted,

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